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In The

Supreme Court of the United States

October Term, 1971

71 - 644

RUDOLPH SANTOBELLO,

Petitioner,

- against -

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Writ of Certiorari to the Appellate Division of the Supreme Court of the State of New York, First Judicial Department.
Petition for Certiorari filed March 18, 1971
Certiorari granted May 29, 1971

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1971

No. _____

- -x

RUDOLPH SANTOBELLO,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

- -x

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, RUDOLPH SANTOBELLO, respectfully prays that a Writ of Certiorari issue to review the determination of the United States Court of Appeals for the Second Circuit, rendered the 12th day of October 1971 affirming the judgment of the United States District Court for the Southern District of New York which had convicted him of violating 18 U.S.C. 111 (assault) after trial before Weinfeld, D.J. and a jury.

The Court sentenced the defendant to a term of 18 months imprisonment.

Opinion Below

No opinion was rendered by the Circuit Court.

Jurisdiction

The jurisdiction of this Court is predicated upon 28 U.S.C. 1254(1). The order of affirmance was issued the 12th of October 1971.

Questions Presented

1. Whether petitioner was denied a fair trial by the trial court's denial of his timely motion for a severance, particularly since he was named in one unrelated count of seven counts of an indictment, six of which arose out of an alleged violation of 26 U.S.C. §5301(c)(4) and 5606 (Adulteration of bottles of liquor) — Santobello being charged with Assault?

2. Whether joining petitioner with other defendants who were essential witnesses to his defense, violated his Sixth Amendment Right to compel attendance of witnesses in his behalf, especially since the joinder of these persons in the indictment was irrational and inconsistent and may well have been a stratagem to prevent Santobello from using them as witnesses?

3. Santobello was charged with an assault (18 U.S.C. 111) and was not involved in the other six counts of the indictment. Did the trial court's instructions to the jury to "ignore" any evidence as to the other counts of the indictment as far as Santobello was concerned justify the denial of a severance?

4. Whether the evils condemned in Bruton v. United States, 391 U.S. 123, are compounded in the case at bar by compelling petitioner to stand trial jointly with other defendants where the Court knew that evidence as to completely unrelated crimes would be introduced?

5. Did the trial court's admonition to the jury to "ignore" any evidence as to other crimes of co-defendants contemplate the performance of a "mental gymnastic" which was impossible?

Constitutional and Statutory Provisions Involved

THE FIFTH AMENDMENT and 18 U.S.C. 111 as well as 26 U.S.C. §§5301(c)(4) and 5606 are involved. Also involved in Rule 14 Federal Rules of Criminal Procedure.

Statement of the Case

The case is very simple so far as petitioner is concerned.

He allegedly placed his hand on a federal agent who in turn was touching an acquaintance of petitioner.

The context of these events reveals that several agents of the Alcohol, Tobacco and Firearms Division of the Treasury Department invaded a bar known as "Chez Joey" in the Bronx, New York. They were not armed with any search warrant or other authority and did not obtain the consent of

the management, except by his submission to lawful authority. ("Go ahead and do what you have to do" — Agent Ike.) (66)*

About 100 feet from the bar, Agent Ike had his arm on co-defendant Natale, and felt his arm being removed therefrom. Ike ascertained that Santobello was the one who had touched him.

Ike declared that Santobello uttered a threat at the same time, but then left the scene. No complaint against Santobello who was known to the authorities was made for several months.

The operators of "Chez Joey" bar were questioned about having adulterated some liquor. This was the reason for the agents to be there in the first place.

The alleged "assault" by Santobello was not in the Bar and had nothing to do with the alleged violations of Title 26.

The trial court told the jury that petitioner was only involved in one count, and none of the others.

The trial court admonished the jury at the commencement of trial, after having denied a severance motion (32, 33):

> "The Court: But in no respect may you consider any of this evidence insofar as defendant Rudolph Santobello is con-

---

* Numerals in parenthesis refer to pages of the Appendix in the Court below unless otherwise indicated.

cerned. He is named under a different count and a different charge entirely."

This instruction was obviously an exercise in futility since this Court itself has recognized the impossibility of a jury actually performing such "mental gymnastics" (see infra).

Argument

I.

PETITIONER WAS NAMED IN BUT ONE OF SEVEN COUNTS OF AN INDICTMENT, THE SIX OTHER COUNTS OF WHICH WERE IN NO WAY CONNECTED WITH THE ACTIVITY OF SANTOBELLO WHICH RESULTED IN HIS INDICTMENT. THE TRIAL COURT THEREFORE ERRED IN DENYING A SEVERANCE SINCE PETITIONER WAS PREJUDICED BY TESTIMONY ADDUCED AGAINST THE OTHER DEFENDANTS AS TO UNCONNECTED CRIMES. THIS DEPRIVED HIM OF A FAIR TRIAL.

A. In addition, Santobello was in essence precluded from compelling the testimony of the co-defendants in his behalf (Sixth Amendment) since they were jointly on trial with him.

In the case at bar, Santobello and two other defendants, Natale and Galasso, were charged in a seven count indictment wherein the offenses, so far as Santobello was involved, were not connected. Santobello was charged in only one count with an assault (touching only) of a federal officer about 100 feet from a bar. The indictment stemmed from violations of 26 U.S.C. 5301(c)(4)

and 5606 (adulteration of liquor). One of the other two defendants was charged with disconnected assaults, but these events had nothing to do with Santobello.

The evidence introduced as to the other six counts was not the same or even similar to that adduced against petitioner. There was no singleness of issues and common factual bases were absent. Thus, it was grave error to have denied the severance.

McElroy v. United States, 164 U.S. 76, 81 (1896);
Ingram v. United States, 4 Cir. 1959, 272 F.2d 567;
Ward v. United States, C.A. D.C. 1961, 289 F.2d 877;
Tillman v. United States, 5 Cir. 1969, 406 F.2d 930, 933, n. 5, cert. denied, 395 U.S. 830.
See, Rule 14, F.R.Cr. Proc.

The record of the trial makes it patent that Santobello was involved only in an assault on a federal officer who was himself possibly assaulting a friend of Santobello. Petitioner did no more than touch the agent. No injury at all was inflicted.

The other two defendants were involved in violations of Title 26 concerning the alleged adulteration of liquor. They, too, were charged with acting in concert with each other in the violations of Title 26. Natale was separately accused of assault, but this had nothing to do with the activities of petitioner and occurred at a different time and place.

Thus, it is manifest that the joinder was prejudicial.

There is prejudice by the very fact of joinder where the offenses as charged are not interrelated and are not connected with each other (McElroy and Ward, supra).

Perhaps the two most important witnesses which Santobello could have utilized were his co-defendants, Natale and Galasso. Since there was a joint trial, however, it was impossible to "compel" them to testify as the Sixth Amendment commands, because they had a Fifth Amendment right not to testify at their own trial for a criminal offense, albeit a completely different one.

We suggest that this might well have been a "stratagem" of the government to accomplish two purposes to the prejudice of petitioner, to wit: (1) inculpating him by unconnected and irrelevant crimes committed by others, and (2) preventing him from compelling witnesses in his behalf under the Sixth Amendment.

The instruction of the Court for the jury to refrain from considering any other evidence against Santobello, except that involving his charge (count 5) was quite futile, as this Court noted in Bruton v. United States, supra and cases cited therein. No jury can be expected to perform such "mental gymnastics" by accepting evidence selectively against persons jointly on trial.

The evils mentioned above and the inability to call the co-defendants as witnesses was called to the trial court's attention specifically in the

timely pre-trial motion which was made for a severance. Thus trial counsel told the Court:

> "It is the present intention of your deponent as attorney for Santobello to call defendants Natale and Galasso as witnesses for the defense of Santobello. Your deponent submits that if Natale and Galasso remain joined in the instant indictment with defendant Santobello the probability of their testifying in behalf of Santobello is greatly diminished and for all intents and practical purposes, nonexistent" (26).

The affidavit of trial counsel went on to detail the facts that none of the evidence involved in the other six counts of the indictment had any connection with Santobello and that he could only suffer prejudice by joint trial.

There does not even appear to be any serious dispute about the fact that virtually all of the evidence as to the other six counts was totally irrelevant to the single count against Santobello. The trial court so charged the jury and asked them to disregard that other evidence as to petitioner. But as was noted in Bruton and other cases:

> "Not even appellate judges can be expected to be so naive as to really believe that all twelve jurors succeeded in performing what Judge L. Hand aptly called 'a mental gymnastic which is beyond not only their powers, but anybody else's.' Nash v. United States, 54 F.2d 1006. 1007 (2 Cir. 1932)." (Emphasis ours.)

United States v. Bozza, 2 Cir. 1966, 365 F.2d 206, at 215.

In view of the foregoing the petitioner was deprived of a fair trial; was prejudiced and attainted with evidence as to disconnected crimes; and could not call the co-defendants as witnesses in derogation of his Sixth Amendment rights because of the prejudicial joinder.

Conclusion

The Petition for Certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner
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APPENDIX

Order of Affirmance

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twelfth day of October, one thousand nine hundred and seventy-one.

Present:
HON. TOM C. CLARK,
Associate Justice

HON. HENRY J. FRIENDLY,
Chief Judge

HON. IRVING R. KAUFMAN,
Circuit Judge

- -x

United States of America,

Plaintiff-Appellee,

v.

Joseph O. Natale, et al.,

Defendants,

Rudolph Santobello,

Defendant-Appellant.

- -x

Order of Affirmance

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

Indictment

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x
UNITED STATES OF AMERICA, :
71 Crim. 330
-v- :
JOSEPH O. NATALE, RUDOLPH SANTOBELLO and FRANK GALASSO, :
Defendants. :
- -x

JUDGE WEINFELD

The Grand Jury charges:

Indictment

On or about the 29th day of June, 1970, in the Southern District of New York, JOSEPH O. NATALE, using a deadly and dangerous weapon, to wit, a partially full bottle containing liquor, unlawfully, wilfully and knowingly did forcibly assault, resist, oppose, impede, intimidate and interfere with Special Investigator Robert Doyle, an officer of the Alcohol, Tobacco and Firearms Division of the Internal Revenue Service, knowing him to be such officer, while the said Special Investigator Doyle was engaged in and on account of the performance of his official duties.

(Title 18, United States Code, Sections 111 and 1114)

COUNT TWO

The Grand Jury further charges:

On or about the 29th day of June, 1970, in the Southern District of New York, JOSEPH O. NATALE unlawfully wilfully and knowingly did forcibly assault, resist, oppose, impede, intimidate and interfere with special Investigator Kenneth Waxman, an officer of the Alcohol, Tobacco and Firearms Division of the Internal Revenue Service, knowing him to be such officer, while the said Special Investigator Waxman was engaged in and on account of the performance of his official duties.

(Title 18, United States Code, Sections 111 and 1114)

Indictment

COUNT THREE

The Grand Jury further charges:

On or about the 25th day of July, 1969, in the Southern District of New York, JOSEPH O. NATALE, the defendant, a person who sold or offered for sale distilled spirits, unlawfully possessed twenty-six (26) bottles in which a substance had been placed in violation of the provisions of Title 26, United States Code, Section 5301(c)(3), in that the said substance was other than that contained in such bottles at the time of stamping pursuant to the provisions of Title 26, United States Code, Chapter 51.

(Title 26, United States Code, Sections 5301(c)(4) and 5606)

COUNT FOUR

The Grand Jury further charges:

On or about the 29th day of June, 1970, in the Southern District of New York, JOSEPH O. NATALE, the defendant, a person who sold or offered for sale distilled spirits, unlawfully possessed nine (9) bottles in which a substance had been placed in violation of the provisions of Title 26, United States Code, Section 5301(c)(3), in that the said substance was other than that contained in such bottles at the time of stamping pursuant to the provisions of Title 26, United States Code, Chapter 51.

(Title 26, United States Code, Sections 5301(c)(4) and 5606)

COUNT FIVE

The Grand Jury further charges:

On or about the 29th day of June, 1970, in the Southern District of New York, RUDOLPH SANTOBELLO unlawfully, wilfully and knowingly did forcibly assault, resist, oppose, impede, intimidate and interfere with Special Investigator Murray Ike, an officer of the Alcohol, Tobacco and Firearms Division of the Internal Revenue Service, knowing him to be such officer, while the said Special Investigator Ike was engaged in the performance of and on account of his official duties.

(Title 18, United States Code, Sections 111 and 2)

COUNT SIX

The Grand Jury further charges:

On or about the 25th day of July, 1969, in the Southern District of New York, FRANK GALASSO, the defendant, being an agent and employee of JOSEPH O. NATALE, a person who sold or offered for sale distilled spirits, unlawfully did participate in the unlawful possession of liquor bottles in which a substance had been placed in violation of the provisions of Title 26, United States Code, Section 5301(c)(3), in that the said substance was other than that contained in such

bottles at the time of stamping pursuant to the provisions of Title 26, United States Code, Chapter 51.

(Title 26, United States Code, Sections 5301(c)(4) and 5606; Title 18, United States Code, Section 2)

COUNT SEVEN

The Grand Jury further charges:

On or about the 29th day of July, 1970, in the Southern District of New York, FRANK GALASSO, the defendant, being an agent and employee of JOSEPH O. NATALE, a person who sold or offered for sale distilled spirits, unlawfully, wilfully and knowingly did participate in the unlawful possession of liquor bottles in which a substance had been placed in violation of the provisions of Title 26, United States Code, Section 5301(c)(3), in that the said substance was other than that contained in such bottles at the time of stamping pursuant to the provisions of Title 26, United States Code, Chapter 51.

(Title 26, United States Code, Sections 5301(c)(4) and 5606; Title 18, United States Code, Section 2)

WHITNEY NORTH SEYMOUR, JR.
United States Attorney for the
Southern District of New York
Attorney for the United States of
America

FOREMAN

PFB:jem

Pertinent Portion of Motion for Severance

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Same Title]

SIR:

PLEASE TAKE NOTICE upon the annexed affidavits of GILBERT S. ROSENTHAL and RUDOLPH SANTOBELLO, both sworn to the 11th day of January, 1971, and upon the indictment herein and all the papers and proceedings heretofore filed and had herein, the undersigned will move this Court on the 19th day of January, 1971, at a Motion Term, to be held at the United States Courthouse, Room 318, Foley Square, City, County and State of New York, at 2:15 o'clock in the afternoon of that day or as soon thereafter as counsel can be heard, for Orders, Directions and Judgments as follows:

I.

Granting the defendant, Rudolph Santobello, pursuant to Rule 14 of the Federal Rules of Criminal Procedure, a severance of his trial from that of the co-defendants named in the within indictment.

Pertinent Portion of Affidavit of Gilbert S. Rosenthal in Support of Motion for Severance

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Same Title]

STATE OF NEW YORK)
) SS:
COUNTY OF NEW YORK)

GILBERT S. ROSENTHAL, being duly sworn, deposes and says:

1. That he is an attorney at law duly admitted to practice in the State of New York and in the within Court.

2. That he is the attorney for the defendant RUDOLPH SANTOBELLO and fully familiar with all the facts and circumstances heretofore had herein.

3. That the foregoing omnibus motion has been made on behalf of the defendant Santobello for the various relief requested pursuant to the Federal Rules of Criminal Procedure.

4. That the defendant Santobello is one of three defendants and is charged with alleged violation of law in only one count (Count Five) of a seven count indictment. That Count Five charges the defendant Santobello with an alleged violation of Sections 111 and 2 of Title 18 of the United States Code in that it is charged that on June 29,

Pertinent Portion of Affidavit of Gilbert S. Rosenthal in Support of Motion for Severance

1970, he assaulted, resisted, opposed, impeded, intimidated and interfered with a Special Investigator of the Alcohol, Tobacco and Firearms Division of the Internal Revenue Service while such Special Investigator, a Mr. Ike, was engaged in the performance of his official duties. Santobello is named alone in Count Five.

5. All the other Counts of the indictment concern the other defendants named therein; namely, JOSEPH O. NATALE and FRANK GALASSO. Count One and Two charge Natale with violating Sections 111 and 1114 of the United States Code, it being alleged that he, on June 29, 1970, assaulted, etc. Special Investigators Robert Doyle and Kenneth Waxman respectively they being Special Investigators of the Alcohol, Tobacco and Firearms Division of the Internal Revenue Service. Count Three and Four charge Natale with violating Sections 5301(c)(4) and 5606 of Title 26 on June 25, 1969, and June 29, 1970, respectively in that allegedly Natale, a person who sold or offered for sale distilled spirits, had in his possession on the aforementioned dates 26 and 9 bottles respectively which contained substances other than that contained at the time of stamping.

6. The defendant Frank Galasso is named in Counts Six and Seven of the indictment herein, it being alleged that he was an employee of his co-defendant Natale and that he knowingly and unlawfully participated in the possession of the adulterated spirits referred to in Counts Three and Four.

Pertinent Portion of Affidavit of Gilbert S. Rosenthal in Support of Motion for Severance

7. Investigations made and caused to be made by your deponent discloses that the background surrounding the finding of the indictment herein, briefly, is as follows: The defendant Natale was the sole owner and licensee of a bar, grill and restaurant known as the Chez Joey which was located at 2136 Williamsbridge Road in the County of Bronx, City and State of New York and within the confines of the Southern District of New York. That Mr. Natale operated the business in question for several years without being the object of the attention of law enforcement agencies of the City, State and Federal authorities.

8. Sometime in the spring or early summer of 1969 a New York City detective by the name of Vincent Albano was shot and wounded in the vicinity of the aforementioned bar shortly after he had been a patron at the said bar. From then on both Mr. Natale and his aforementioned place of business came the target of constant harassment and attention by various law enforcement agencies of the City and State of New York and of the United States Government. On the night of June 29, 1970, several investigators of the Alcohol, Tobacco and Firearms Division of the Internal Revenue Service had gone into the bar in question. At no time during the evening or night of June 29, 1970, was the defendant Santobello in the premises of the establishment known as Chez Joey and located at 2136 Williamsbridge Road in the County of Bronx, City and State of New York. The defendant Natale was arrested on the night of June 29, 1970. The defendant Galasso

Pertinent Portion of Affidavit of Gilbert S. Rosenthal in Support of Motion for Severance

who had been in the employ of Natale as a bartender was never arrested but received a notice to appear for pleading in the within Court to the within indictment, the appearance date being December 2, 1970. Your deponent's client Santobello was arrested on the evening of December 1, 1970, while leaving his home, the arrest being effected upon a bench warrant issued by this Court on or about December 1, 1970. Santobello was arraigned in this Court on December 2, 1970, and released in $15,000. Personal Recognizance Bond secured by $1,500. cash by bail being fixed by the HON. IRVING BEN COOPER, D.J. Thereafter each of the defendants entered a plea of Not Guilty in this Court on or about December 22, 1970, and granted 30 days within which to make motions.

9. Your deponent in this affidavit will attempt to deal with the items contained within the Notice of Motion in the same order in which they appear in the Notice of Motion.

I.

10. The first branch of the within motion seeks a severance on behalf of defendant Santobello pursuant to Rule 14 of the Federal Rules of Criminal Procedure. As related supra, the indictment consists of seven Counts, only one Count of which refers to the defendant Santobello.

11. Your deponent respectfully submits that upon the trial of the issues set forth within the said indictment testimony will be elicited by the

Pertinent Portion of Affidavit of Gilbert S. Rosenthal in Support of Motion for Severance

United States Attorney concerning the facts upon which the other six Counts are based. None of these facts relate to the defendant Santobello. It is not alleged in the indictment nor is it the fact that Santobello was engaged either as an entrepreneur or an employee in the sale or possession for the purpose of sale of distilled spirits or that he in any manner was connected with the alleged violations of Sections 5301(c)(4) and 5606 or 5605 as is charged against the defendants Natale and Galasso. Nor is there any allegation in the within indictment which purports to allege that the defendant Santobello was in any manner involved with the charges lodged against Natale for violation of Sections 111 and 1114 of Title 18, United States Code. Testimony tending to prove the validity of the aforementioned charges against the defendants Natale and Galasso will of necessity prejudice the jury, the facts, against your deponent's client the defendant Santobello. It is the present intention of your deponent as attorney for Santobello to call the defendants Natale and Galasso as witnesses for the defense of Santobello. Your deponent submits that if Natale and Galasso remain joined in the instant indictment with the defendant Santobello the probability of their testifying in behalf of Santobello is greatly diminished and for all practical purposes nonexistent. It is further submitted by your deponent that there is absolutely no statement or allegation of fact in the within indictment which tends to connect or relate Santobello with the other six Counts of the indictment which referred to the defendants Natale and Galasso. To compel Santobello and his counsel

Pertinent Portion of Affidavit of Gilbert E. Rosenthal in Support of Motion for Severance

to sit through a trial of facts including six unrelated Counts is most unfair and prejudicial to Santobello and will require him to pay a fee to counsel which would be disproportionate with the time that would be consumed in a trial of the issue involving Santobello.